Crl.A. 286/2003

BEFORE

HON'BLE MR JUSTICE P.G.AGARWAL

Heard Mr.Z.Kamar, learned counsel for the appellant and Mr. P.C.Gayan, learned P.P. Assam.

In Sessions Case No. 114/2002 the accused appellant Parimal Barman was tried by the learned Sessions Judge, Barpeta and consequently convicted him for commission of offence under Section 366(A) and sentenced to undergo imprisonment for seven years and to pay fine of Rs.3000/-, in default in payment of fine, to undergo further imprisonment for six months. The appellant has also been convicted under Section 376 IPC and sentenced to undergo rigorous imprisonment for ten years and to pay fine of Rs.5000/-, in default in payment of fine, to undergo further imprisonment for six months. Both the sentences were directed to run concurrently.

Prosecution case, in brief, is that on 29.03.2001 the accused eloped with the victim PW-2 Smti Sadhana Barman and thereafter took her from place to place and during the period committed rape on her. She was kept for more than a month and subsequently she was recovered from the custody of the accused.

During trial the prosecution examined as many eight witnesses and the defence examined one. In this case, the defence raised the plea of juvenile justice. It was pleaded that the accused was 13 years 4 months at that time and support of the claim a School Registrar (Ext-KA) was produced, which was duly considered by the trial Court and the trial Court for the reasons mentioned in the impugned judgment refused the accept that plea. We find that the plea was rightly rejected by the trial Court. We also find that the accused in his statement recorded under Section 313 Cr.P.C. the accused disclosed his age as 20 years.

Now coming to the prosecution case regarding elopment, we find this has been admitted by the accused when he stated that he had an affair with the victim and that prompted him to take her. Learned counsel for the appellant, however, submits that the girl was also a consenting party. Although, her age might be less, she was in the percolation of adulthood and a consenting and willing party.

We find from the evidence of the victim that she was taken from Patiladoha Railway Station to Bijni Railway Station and then to Barpeta Road by bus and therefrom they went to Tangla in train and there they stayed for a month. She was also brought to Mangaldoi Court. All the above circumstances goes to show that girl was also a consenting party and as such the conviction of the accused appellant under Section 366-A IPC is unwarranted and is set aside.

Now, coming to the question of commission or rape, the learned counsel for the appellant submits that the evidence of PW-2 do not disclose that the accused committed sexual intercourse against her will. We find that there is no cross-examination of the victim on the above point. In view of provisions of Section 114-A of the Evidence Act, the accused has failed to rebut the above presumption.

Mr.Z.Kamar, however, submitted that as elopment was a wilfull act, the sexual intercourse may also be deemed or presumed to be wilfull. The girl may agree to elope, but that does not mean that she has also agreed to physical relationship. More so, when the victim has stated that it was against her consent.

In view of the above, the conviction of the accused appellant under Section 376 IPC is affirmed. In this case, we find that the accused was in jail custody during investigation from 30.04.2001 to 13.07.2001 and thereafter from the date of conviction i.e. 18.06.2003 to till date. Thus, he was in jail custody for about four years by now. Considering the age of the accused and the facts and circumstances of the case, we reduce the sentence to the period already undergone by him.

Let the accused Parimal Barman be released forthwith, if not wanted in connection with any other case.

Send down the records.